

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

OCT 25 1933

Henry M. Dodge

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA

APRIL TERM 1933

No. 5952

378

WILLIAM J. NEALY, ET AL., APPELLANTS,

vs.

LUTHER H. REICHELDERFER, ET AL., COM-
MISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

DION S. BIRNEY,
PAUL E. LESH,

Attorneys for William J. Nealy and others.

C. CLINTON JAMES,

Attorney for Washington City Orphan Asylum.

FRANK J. EHRHARDT,

Attorney for Christian Heurich and

Christian Heurich, Jr.

INDEX.

	Page
STATEMENT.....	1
The Proceedings Below.....	1
The Facts.....	3
The Errors Relied Upon and Appellants' Con- tentions.....	5
ARGUMENT:	
I. The Commissioners were without authority to prosecute this proceeding because it seeks to condemn land not in accordance with the Highway Plan.....	6
II. Appellants may question the authority of the Commissioners to prosecute this pro- ceeding insofar as their rights are con- cerned.....	10
III. The benefits assessed against appellants are in part based on condemnation of part of Lot 13 which condemnation was unneces- sary, discriminatory and of no benefit.....	16
IV. Credit for the dedication of Van Ness Street has not been given as required by statute.....	17
V. The amount allowed as a credit for the dedication of Van Ness Street is demon- strably unreasonable.....	22
VI. The assessment of supposed benefit against The Washington City Orphan Asylum and other lands west of Wisconsin Avenue is so unreasonable as to constitute obvious error....	23
VII. The failure to assess benefits against the uncondemned portion of Lot 801 is arbitrary and discriminatory.....	25
CONCLUSION.....	26

Cases Cited

	Page
Briggs <i>vs.</i> Brownlow, 49 App. D. C. 345.....	20
Dougherty <i>vs.</i> Galliher, 58 App. D. C. 166.....	7
Fay <i>vs.</i> MacFarland, 32 App. D. C. 295.....	7
Lynchburg Investment Corp. <i>vs.</i> Rudolph, 40 App. D. C. 129.....	20
Mitchell <i>vs.</i> Reichelderfer, 61 App. D. C. 50.....	16
Newman <i>vs.</i> Newman, 42 App. D. C. 588.....	10
Shannon and Luchs Construction Co., <i>vs.</i> Reichel- derfer, 61 App. D. C. 36.....	14
Smith <i>vs.</i> Gotwals, 61 App. D. C. 304.....	13
Walter <i>vs.</i> MacFarland, 27 App. D. C. 182.....	7
Wight <i>vs.</i> Davidson, 181 U. S. 371.....	13

Statutes Cited

D. C. Code of 1929:

Title 12, Sec. 16.....	3
Title 25:	
Sec. 51.....	6
Sec. 52.....	7
Sec. 58.....	5
Sec. 69.....	7
Sec. 71.....	2

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM 1933

No. 5962

WILLIAM J. NEALY, ET AL., APPELLANTS,

vs.

LUTHER H. REICHELDERFER, ET AL., COM-
MISSIONERS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

STATEMENT

This appeal is from a final judgment assessing benefits in a condemnation proceeding. The judgment below is in the form of an order overruling appellants' objections and exceptions to a verdict assessing benefits against appellants' lands and finally ratifying and confirming the verdict (R. p. 44) which had theretofore been ratified as to damages awarded (R. p. 13).

The Proceedings Below

This proceeding was begun March 11, 1932, by the filing of a petition for condemnation of land for the widening of Van Ness Street and for the assessment of benefits (R. p. 1). Notice was published in local newspapers (R. p. 8). The only persons designated to be personally served and who were served were the

owners of the property sought to be condemned. (R. pp. 7-8.)

No notice or process was so served on any of the appellants and none of them participated in the proceeding leading to the verdict of the jury.

The verdict fixing damages and assessing benefits against the appellants was filed August 10, 1932 (R. p. 10). On August 31, 1932, an order was entered ratifying and confirming the verdict "except as to benefits assessed against land no part of which was taken in this proceeding" (R. p. 13). The appellants were owners of land assessed for benefits no part of which was taken (R. pp. 18 to 24).

In accordance with the Act of Congress approved May 29, 1928, D. C. Code of 1929, Title 25, Sec. 71, 45 Stats. 953, c. 863, notice of assessment of benefits with statement of amount assessed was mailed to each of the appellants (R. p. 24) and publication was ordered against them by the order entered October 18, 1932 (R. pp. 14 and 15). On November 10, November 17 and November 26 (R. pp. 16, 26, 29 and 30 and page 2 addition to record) exceptions and objections to the verdict were filed by appellants, within the time fixed by the court (R. p. 16).

The exceptions and objections were considered by the Court, and ordered over-ruled by a memorandum filed December 30, 1932. Pursuant to the memorandum an order was entered January 16, 1933, overruling the objections and exceptions and finally ratifying and confirming the verdict and assessments, from which order this appeal is prosecuted (R. p. 44).

The Facts.

The land condemned is that shown as the shaded area on the plat attached at R. p. 6, being parts of Lots 13 and 801 in Square 1831. It so happens that all of the lots selected by the jury for assessment of benefits are among those included and shown on this same plat.

It will be noted that the east 17 feet of the north line of the property condemned, that is, that portion of this northern line which runs through Lot 13, was already a building restriction line. The remaining 72.6 feet of the north line of the property condemned is a prolongation of the line of this building restriction line from the point where it ended, that is, from Lot 13 to Wisconsin Avenue.

It is our view that the present attempt of the Commissioners to buy a portion of Lot 801 together with a portion of Lot 13 at the expense of the appellants is not the first departure from the law made by the Commissioner for the benefit of the owners of Lot 801. The first departure from the law in dealing with this Lot 801 occurred, as we see it, May 27, 1927, when the Commissioners permitted the owner of it to make a dedication for Van Ness Street which was illegal because not in accordance with the statutes relating to the Permanent Highway Plan.

On the Permanent Highways Plan, Van Ness Street is shown 90 feet in width in that portion of it with which we are here concerned. By the Act of May 31, 1900, (31 Stats. 248, Code of 1929, Title 12, Sec. 16), the Commissioners were authorized to accept dedications in the case of streets shown as 90 feet in width on the Plan at a width of not less than 60 feet, provided the parties dedicating established building restriction lines to agree with the lines marking the full 90 foot width,

that is to say, a 60 foot street, with strips of 15 feet on each side for what is commonly called parking, could be accepted.

The dedications affecting the property with which we are here concerned were two. The first was that approved February 6, 1923. The second was the one we consider was a departure from the law, that of April 23, 1927. The plats of these two dedications are attached to the record opposite page 66.

The dedication of February 6, 1923 (the larger one of these two plats), was that which created the lots owned by the larger group of the appellants. Van Ness Street was dedicated at a width of 60 feet, with building restriction lines marking the 90 foot width, in accordance with the statute. This dedication included the placing of the building restriction line in Lot 13. What is now Lot 801, then Parcel 34/36, was in different ownership and left unaffected by the dedication.

The dedication of April 23, 1927 (the smaller one of these two plats), was of part of this parcel 34/36, now Lot 801. This dedication plat shows Van Ness Street continued through this lot at the 60 foot width, but the building restriction line, which is required by the statute in such case, is not continued through his property. In fact, there is a note upon the dedication sheet that a portion of the street at the 60 foot width, occupied by the corner of his house, is not included in the dedication.

Our view that this dedication was not permissible under the statute is based upon the failure of the Commissioners to require as a condition to the dedication at the 60 foot width that the owner establish the building restriction line as a part of his dedication.

The present proceeding is an effort by the Commissioners to purchase the fee of that portion of this lot now 801 which should have been bounded by a building

restriction line in the dedication of April 23, 1927, and to purchase also the fee of that portion of Lot 13 which had already been restricted, at the expense of the appellants, who will, if the judgment below is affirmed, be compelled against their will to contribute to this purchase.

In assessing benefits against the appellants who are owners of lots which formed a part of the tract included in the dedication of February 6, 1923, there was an attempt to give credit in accordance with (1901) Code Section 491 g, Code of 1929, Title 25, Sec. 58, for the value of that portion of the tract which had been dedicated for the opening of Van Ness Street. This credit was, however, so allocated among the lots comprising a part of that tract as to destroy practically all benefit to the appellants. Furthermore, the amount of the total credit so given was computed at a rate which we contend was so shockingly low, as compared with the rate paid for the land immediately adjacent which was condemned, as to constitute a manifest error in the computation of the credit.

An assessment was made against tracts of land owned and used by appellants, The Washington City Orphan Asylum, and the Heuricks west of Wisconsin Avenue, which is so patently unreasonable as to constitute error.

The jury failed to assess any benefits against the uncondemned portion of Lot 801 and this failure is patently discriminatory.

The Errors Relied Upon and Appellants' Contentions

The errors assigned (R. pp. 46, 48, 50) and the contentions made below raise issues upon which appellants' contentions may be summarized as follows:

1. The Commissioners were without authority to

prosecute this proceeding because it seeks to condemn land not in accordance with the Highway Plan.

2. Appellants may question the authority of the Commissioners to prosecute this proceeding insofar as their rights are concerned, though the proceeding had passed to final judgment against the parties originally summoned before the appellants were brought into the case.

3. The benefits assessed against appellants are in part based on condemnation of part of Lot 13 which condemnation was unnecessary, discriminatory and of no benefit.

4. Credit for the dedication of Van Ness Street has not been given as required by statute.

5. The amount allowed as a credit for the dedication of Van Ness Street is demonstrably unreasonable.

6. The assessment of supposed benefit against The Washington City Orphan Asylum and other lots west of Wisconsin Avenue is so unreasonable as to constitute obvious error.

7. The failure to assess benefits against the uncon-
demned portion of Lot 801 is arbitrary and discrimi-
natory.

ARGUMENT

The appellants' contentions are hereinafter taken up in the order in which they are last above stated.

I. The Commissioners Were Without Authority to Prosecute This Proceeding Because it Seeks to Condemn Land Not in Accordance with the Highway Plan.

The appellees seek to maintain this proceeding under the authority given in the statutes they invoke in their petition (Rec. p. 2). They there invoke the Act of May 4, 1913 (D. C. Code of 1929, Title 25, Sec. 51;

37 Stats. 949) which authorizes them "to . . . widen any street . . . to conform with the plan of the permanent system of highways in that portion of the District of Columbia outside of the cities of Washington and Georgetown adopted under the Act of Congress approved March 2, 1893, as amended by the Act of Congress approved June 28, 1898, by condemnation under the provisions of sub-chapter 1 of Chapter XV of the Code of Law for the District of Columbia." They also invoke the Act of Congress approved May 28, 1926 (D. C. Code of 1929, Title 25, Sec. 69; 44 Stats. 675) which also provides only "for the . . . widening . . . of . . . any street, avenue, road or highway in accordance with the plan of the permanent system of highways for the District of Columbia."

Sub-chapter 1 of Chapter XV of the Code of law for the District of Columbia referred to above and in the Commissioners' petition as the statute pursuant to which their petition is filed grants no additional power but merely prescribes the procedure to be followed in such proceedings, when authorized by Congress (1901 Code Section 491A; D. C. Code of 1929, Title 25, Sec. 52).

The Commissioners of the District of Columbia have no power to acquire land by condemnation except insofar as that power has been expressly conferred by Congress. *Walter vs. Macfarland*, 27 App. D. C. 182; *Fay vs. Macfarland*, 32 App. D. C., 295, 299; *Dougherty vs. Galliher*, 58 App. D. C. 166, 167.

If the addition of the 15 foot strip sought to be condemned in this proceeding to the north side of Van Ness Street will not make that street conform to the Highway Plan then the Commissioners have no authority

to prosecute the proceeding. Such faint argument as was made on behalf of the Commissioners in the court below to the effect that the street as so widened would be of the width prescribed by the Highway Plan was but a repetition of the arguments this court over-ruled in *Dougherty vs. Galliher*, supra.

To make it appear that the widened street will conform to the Highway Plan the Commissioners must contend that it will then be 90 feet in width. The Highway Plan showing the 90 foot width for Van Ness Street is a part of the record though not physically incorporated therein (Rec. p. 55). To maintain this contention, the Commissioners have to count the 15 foot private parking space on the south side as a part of the street.

In passing upon this same contention in the *Galliher* case this court said:

“The 15 feet on the north side is, under the Act of May 31, 1900 subject to certain uses by the District, but it is not a part of the street for all purposes. So to hold would nullify the express provisions of the act.”

If the question were an open one, the Commissioners would have to make two inconsistent contentions to maintain their present proceeding. To maintain their proposition that the street as widened will be 90 feet wide, they must count the 15 feet of parking on the south side as street. To maintain their position that the condemnation of that portion of Lot ~~231~~ proposed to be condemned is a widening of the street they must contend that this 15 foot strip, which is in all respects like the 15 foot strip on the south side, is not already a part of the street.

14

Disposing of the identical issue in *Dougherty vs. Galliher*, *supra*, this court said:

“The space between the street lines as established and the building restriction lines, the act provided, should ‘be considered as private property set aside and to be used for parking purposes.’ This parking space on the south side of the street is treated in appellants’ petition as private property, for it is included in the land to be condemned; but, in order to make the street 120 feet in width, the parking space on the north side is treated in the petition as public property, although it is of precisely the same character as that on the south side. What the District is attempting to do, therefore, is to add 45 feet to a 60-foot street, which would make a street 105 feet in width, and not 120 feet, as required by the Permanent Highways Plan.”

If one reverses the direction, that is, substitutes north for south, and changes the figures from 120 feet to 90 feet, and correspondingly reduces the other figures, what is above quoted might well have been written to dispose of the present case.

It should be sufficient for the purposes of this case for us to point out wherein what the Commissioners are now attempting to do is unauthorized and illegal. It seems not necessary for us to go further to point out what course they could have followed to extricate themselves from the dilemma in which they were placed by their acceptance of the dedication of April 23, 1927, by the owner of present Lot 801. We suggest, however, that the Commissioners could have avoided a proceeding which departs from the statute directing them if they had instead of proceeding to condemn title to 15 feet of Lot 801 and Lot 13 proceeded to condemn to establish a building restriction line in accordance

with the statute of June 21, 1906, D. C. Code of 1929, Tit. 25, Sec. 32, 34 Stat. 385. The building restriction line already existing in Lot 13 and in the entire balance of the block could thus have been extended through Lot 801 without increasing the cost of the proceeding by taking any part of Lot 13 or by buying the fee of part of Lot 801. This court has held that a building restriction line may thus be completed for the balance remaining of a full block. *Newman vs. Newman*, 42 App. D. C. 588.

Perhaps the Commissioners refrained from following this simple course which would have involved no departure from the Highway Plan because it would have made so conspicuous their omission to insist upon this building restriction line before accepting the dedication of April 23, 1927 (Rec. p. 56, Plat opposite p. 66), and would have made it possible for owners other than the favored owner of Lot 801 (then 800) to contend that by making the dedication he had impliedly consented to what the statute requires in such case, viz, the contemporaneous establishment of such a building line.

We repeat, however, that the consideration contained in the two preceding paragraphs are perhaps immaterial. Our present point is that what the Commissioners are now attempting to do is not authorized by statute.

II. Appellants May Question the Authority of the Commissioners to Prosecute This Proceeding Insofar as Their Rights are Concerned, Though the Proceeding Had Passed to Final Judgment Against the Parties Originally Summoned Before the Appellants were Brought into the Case.

Whether or not it will be conceded in this court by the Commissioners that the objection dealt with under the first title of this argument would have been well taken

if interposed at the inception of the proceeding, we are of course not yet informed. In the court below, however, the principal contentions made by the Commissioners in this regard were that only the property owner whose land was sought to be taken could raise the objection of non-conformity with the highway plan and that the objection comes too late when made after verdict.

Dealing first with the first of these contentions: The Commissioners urged in the court below that the Galliher case was distinguishable because there the objection that the Commissioners were not proceeding in accordance with the Highway Plan was made by the owner of the land proposed to be taken, whereas in the present case the objection was made only by persons against whom benefits for the taking were proposed to be assessed. It seems obvious to us that the Commissioners have no more authority to assess against the appellants a portion of the cost of taking land not authorized by the statute to be taken, than they have to condemn the land. Persons who are assessed to pay for the land are as truly parties in interest to the proceeding as the persons whose land is taken. The present case is particularly an unfortunate one for the Commissioners in which to make this contention; because in this case the Commissioners appear to have been acting throughout in conformity with the wishes of the parties whose land is condemned and without authority of law. As a practical proposition, it is shocking to hear it contended that if A is willing that it be done, A's land may be taken by condemnation proceeding and the cost assessed against B, even though B is unwilling and the condemnation proceeding is not one authorized by law. And as above noted this becomes more shocking when it is pointed out that A's land had been left in position

where it needs be condemned because of a prior dedication by A illegally approved by the Commissioners.

As to the contention that the objection has been made too late, we respectfully submit the following:

The present appellants were brought into this proceeding pursuant to the Act of Congress of May 29, 1928, 45 Stat. 953, c. 863, D. C. Code of 1929, Tit. 25, Sec. 71, which reads as follows:

“Where in any condemnation proceedings instituted by the Commissioners of the District of Columbia in accordance with the provisions of sections 52 to 65, inclusive, and sections 72 to 93, inclusive, of this title, the jury of condemnation shall assess benefits against any land or parcel of land no part of which was taken by the condemnation proceedings, and the owner of the land or parcel of land so assessed for benefits was not served with notice of the condemnation proceedings, notice of such assessment for benefits shall be given by the Commissioners of the District of Columbia by registered letter, mailed to the last known address of the person listed on the records of the assessor of the District of Columbia, as the owner of the land or parcel of land so assessed, and, in addition thereto, the court shall give public notice of the land or parcels of land assessed for benefits, no part of which was taken by the condemnation proceedings by advertisement once in each of three daily newspapers published in the District of Columbia showing the amount assessed against each such piece or parcel of land and stating the time within which interested parties may file with the court any objections or exceptions they may have to the verdict. The mailing by registered letter and the notice by publication herein provided for shall be sufficient notice to the owner of any land or parcel of land assessed for benefits as aforesaid.”

Since the passage of this statute it is not material to determine whether it is or is not within the power of Congress to authorize assessment of benefits and bind the parties assessed without actual notice. It remains now the law, as it was before, that the Commissioners have no power to proceed to condemn or assess benefits excepting in manner authorized by statutes. In this statute Congress has enacted a new procedure requiring as a *sine qua non* of adjudication of benefits that parties assessed who were not already parties to the proceeding as persons whose land was taken, shall have their day in court after being brought in by the notice prescribed by the statute. Decisions based on the law as it existed prior to the Act of May 29, 1928, such as *Wight vs. Davidson*, 181 U. S. 371, are inapplicable because when they were decided Congress had not yet enacted the procedure above specified which now constitutes the chart by which the Commissioners are authorized to proceed.

Thus in the case of *Smith vs. Gotwals, et al.*, Commissioners, 61 App. D. C. 304, this court had to consider the alleged validity of an assessment for benefits in a case wherein the notice directed to be mailed by the above quoted statute had not been mailed. This court said:

“The requirement of the statute as to notice being mandatory, a failure to comply is jurisdictional.

“The statute (Title 25, D. C. Code) was the chart by which the commissioners were authorized to proceed in taking property by condemnation for street purposes, and the section (71), to which we referred, the authority for assessing benefits against adjacent property not taken. Unless and until its conditions are complied

with, 'there is no authority either to take the property on the one hand or to assess the benefits on the other. In terms it requires that notice to the owner of property assessed for benefits shall be given by letter sent by registered mail. This method was adopted to provide the notice without which the assessment would be invalid. Admittedly the statute was not complied with, and admittedly appellant had no actual notice of the proceeding. He was therefore never at any time brought into the proceeding, and until he was brought in there was no obligation imposed on him to take any action in relation thereto, since whatever action was taken insofar as his rights are concerned was necessarily void. That he might have secured a reopening of the case after getting the tax bill, and thus notice of the proceeding, is of no consequence. There was no obligation on his part to inject himself into a case to which he was not then a party, or to supply jurisdiction in a court where none existed.'"

It seems to us therefore settled that insofar as the rights of the appellants are concerned, the proceedings for the condemnation of Van Ness Street were void until they were given the notice required by the statute and as a result of which they came in court for the first time. This court has decided that prior to the giving of this notice there was no obligation upon the appellants to take any action in relation to these proceedings. It seems to us to follow necessarily that appellants, when they come into court in response to the statutory notice, could invoke any objection to the proceedings insofar as they affect appellants, which might at the beginning have been invoked by the parties respondent to the process which initiated the proceedings.

This contention is supported by the opinion of this court in *Shannon & Luchs Construction Company vs.*

Reichelderfer et al., Commissioner, 61 App. D. C. 36 wherein this court said:

“The effect of the statute in condemnation proceedings is twofold. In the first place, notice is served upon the property owners whose lands are to be condemned. On this issue, trial is had, and if the jury in the assessment of benefits assesses lands owned by others than those who have been brought into court in the first instance, the court is then required ‘to give public notice of the lands or parcels of land assessed for benefits, no part of which was taken by the condemnation proceedings, by advertisement once in each of three daily newspapers published in the District showing the amount assessed against each such piece or parcel of land and stating the time within which interested parties may file with the court any objections or exceptions they may have to the verdict.’

“Congress manifestly intended that the condemnation proceedings should be concluded before the second stage of the proceedings should be instituted.”

In that case this court held that one of the persons whose land was taken, and who was a party respondent summoned into court when the proceeding was instituted in its first stage, could not avail himself of the process against persons like the present appellants to enlarge the time within which he might object to the proceeding upon any ground.

What preceded the verdict and its partial confirmation is doubtless *res adjudicata* as between the District of Columbia and parties whose land was taken, but these appellants, none of whose land was taken, cited into court thereafter for the first time, have now the same right to interpose all appropriate objection to the proposed adjudication against them as had the parties

whose land was taken when they were given their day in court.

The Commissioners in the court below asserted to the court that the case of *Mitchell vs. Reichelderfer, et al.*, Commissioners, 61 App. D. C. 50, the first case wherein this court had under consideration the Act of May 29, 1928, was decided in manner contrary to appellants' contentions. As we read that case, however, what was there decided was only that where the objection to the verdict is to the amounts of the assessments for benefits it is for the court to determine whether such a case upon the facts has been made out by affidavits as warrants the setting aside of a verdict and the summoning of a new jury. In other words, that the fact of a complaint against matters of fact found by the jury is not conclusive to require a retrial by jury unless the court finds merit in the complaint. This is not inconsistent with our position.

III. The Benefits Assessed Against Appellants are in Part Based on Condemnation of Part of Lot 13 Which Condemnation was Unnecessary, Discriminatory and of No Benefit.

The single subject matter of the proceeding was the condemnation of a 15 foot strip from Wisconsin Avenue to the alley, including both part of Lot 801 and part of Lot 13. The jury were therefore properly instructed to assess benefits accruing from this single subject matter, without distinction between such benefit as might have been found to result from the condemnation of Lot 801 on the one hand and such as might result from the condemnation of Lot 13 on the other. The question of damages and the question of benefits the jury were instructed to treat separately and unrelated

(Instructions 2, 6, 14, Rec. pp. 62, 64). It is, therefore, quite immaterial that in awarding damages those payable to the owner of part of Lot 13 were separately awarded at \$720 and those payable to the owner of part of Lot 801 were separately awarded at \$10,780. The benefits assessed were in the total sum of \$6882.50, distributed among the several lot and parcel owners (Rec. p. 11). If, therefore, the condemnation of the part of Lot 13 was error, then an inseparable and unascertainable part of the entire assessment for benefits was error. It is our view that the condemnation of the part of Lot 13 was unwarranted, unnecessary and discriminatory, for the reason that the part of it condemned was the identical part already restricted against building.

There was, therefore, no more reason for the District to acquire title to that part of Lot 13 than there would be for it to acquire title to the 15 foot parking strip already similarly established across Lot 12 or any other lot on the same or the other side of this block of Van Ness Street. Even overlooking the unnecessary expenditure of public money involved, there was certainly no benefit to adjacent or any other property in the acquisition of title to the already restricted part of the lot.

IV. Credit for the Dedication of Van Ness Street Has Not Been Given as Required by Statute.

Herein lies the practical injustice done lot owners who constitute the great majority in number and amount of the appellants (those who united with William J. Nealy in his exceptions, Rec. p. 26), an injustice which would be equally demonstrable even if this proceeding were authorized by law.

As appears from the dedication plat of February, 1923, in evidence in this proceeding, the part of Van

Ness Street then donated to the District was given by Parcels 34/37, 34/31, 34/33 and 34/35, in furtherance of the subdivision of those parcels then made. It was not given by the lots which now face it but was carved out of the parcels in connection with the creation of all the lots. The appellants here, William J. Nealy and others, are the successors in title of the then owners of these parcels, which were then in one ownership and constituted a single "tract".

When the then owner of these parcels dedicated streets, including Van Ness Streets, he had a right to rely on Section 491g of the Code, (enacted February 25, 1903, 34 Stats. 930, now D. C. Code of 1929, Title 25, Sec. 58), which directed in effect that he should have credit for the value of what he gave for Van Ness Street in any future assessment for its widening. If all the land he then owned had remained owned by him as a "tract", whether consisting of several parcels or many paper lots, he still would possess the right the statute gives him to credit, on the widening of Van Ness Street, to the extent of the value of what he gave for Van Ness Street.

We freely admit he could not claim credit for what he gave for Veazey Street, or 38th, or any other than Van Ness, in this proceeding for a widening of Van Ness. But he is entitled to the *full* credit for the value of all he gave for Van Ness.

Instruction to the jury numbered 10 (Rec. p. 63) reads: "You are instructed that the burden of proof rests upon petitioners, the Commissioners of the District of Columbia, to establish the existence and extent of such benefits with respect to the particular parcels of land, and the petitioners must meet such burden with evidence before any assessment of benefits can be made."

The only evidence submitted to the jury as to the

existence and extent of benefits was by the testimony of the witnesses J. Dallas Grady and Claude F. Clark. Accordingly, under the instruction above, it must be assumed that the jury was following this testimony when it found (Rec. p. 11) "the amount of benefits accruing by reason of the condemnation" of the land in this proceeding to be \$6,882.50.

Mr. Clark's testimony (Rec. p. 59) shows that he found separate benefits on the same lots assessed by the jury though in different individual amounts, aggregating \$6,385.06, with nothing in the record to show whether his figures are gross or net or give any credit for the 1923 dedication of Van Ness Street.

The Grady testimony (Rec. p. 57) with respect to benefits summarizes as follows: that the value of that portion of Van Ness Street dedicated in 1923 is \$11,239.50; he did not, however, apply this amount as a credit to the tract which made the dedication, he prorated this amount at the rate of \$38.06 per lot among all the 293 lots in the 1923 subdivision and "that in assessing benefits he took this into consideration and allowed credit for the amount dedicated". The aggregate of the net benefits which Grady finds is \$6,335.69. There are 109 lots in Grady's schedule of benefited lots out of the 293 lots created in the 1923 subdivision, which at the rate of \$38.36 each gives a total of \$4,181.24, the amount of credit which Mr. Grady says he allowed for them against gross benefits found by him. The gross benefits found by Grady are thus \$6,335.69 plus \$4,181.24 or a total of \$10,516.39.

There was no other evidence as to gross benefits before the jury; it had before it only this figure of \$10,516.39 for this item. The jury assessed net benefits aggregating \$6,882.50; therefore the aggregate of all

credits allowed by them did not exceed the difference, \$3,633.89.

Obviously, the tract was not given the credit the statute directed. If the tract had remained in single ownership, our proposition that the verdict is contrary to the statute would be a demonstration, without saying more, the tract being entitled to a credit of \$11,239.50 upon Grady's testimony, which was the only testimony as to the value of the dedicated street.

But, it is replied by the District, the tract is no longer in single ownership, and each lot owner is to be separately considered. We say the change or splitting of ownership cannot under any proper interpretation of the statute lead to a different result. The lot owners severally have taken portions of what the tract owner had, with its burdens but with its benefits as well. They stand in his shoes, and any formula for assessment of benefits which disregards this fact must be unsound.

How zealously the Court of Appeals has guarded dedicating property owners' rights to this full credit is shown by Mr. Justice Robb's opinion in *Briggs vs. Brownlow*, 49 App. D. C. 345, and in *Lynchburg Investment Corp. vs. Rudolph*, 40 App. D. C. 129, 136. Though we know of no appellate court decision on the method of applying this statute to cases of split ownership, we are justified in saying that any specious splitting of the credit which whittles it away and dissipates it will be disapproved.

What the District used here was just such a formula. The credit was not applied against the benefit to the tract. Such an application of the credit would have eliminated the benefit assessment. The result, which stamps the District's method as error, is that in a case where the tract owner would have had enough credit

to eliminate the benefit, some of his successors in interest are to pay benefits.

The only correct method, we respectfully submit, for application where there is a split in ownership between the time of dedication and that of condemnation, is first to apply the total tract's credit against the benefit to the tract, then apportion the net benefit, if any there is, among the lots. This method would not only be just, because it would pass on to the lot owners the credit of their common predecessor in title, but it would be what the statute commands. Had this been done, the figures above recited show the verdict in this case against these successors in interest of the dedicating tract owner would have been impossible.

Consider the District's position in the present case. It received a gift of a 60-foot street nearly two blocks long; it is buying a fifteen foot strip seventy feet long. It is paying \$1.40 a foot for the land it is buying to include in the street, and for credit purposes is allowing 15 cents a foot for land immediately adjoining it that is already in the street. Then, instead of giving credit for the full amount of the gift to it, even at the absurd comparative price of 15 cents, it gives credit for only a small part of its gift and actually calls upon parts of the same land which made it the gift a street two blocks long to pay towards its purchase of the seventy foot strip. The statutory credit is not only whittled down unconscionably but, in large measure, is avoided altogether. And we are told that this is so because the parcels, instead of remaining as parcels, are now subdivided into lots. We cannot believe that credit for this dedication is thus to be avoided in the face of a statute which requires that it be given.

V. The Amount Allowed as a Credit for the Dedication of Van Ness Street is Demonstrably Unreasonable.

The value allowed for Van Ness Street for credit purposes is out of all proportion to the value allowed for condemned adjacent land already subject to building restriction, and the differentiation is arbitrary and discriminatory; if the value for credit purposes is more nearly equalized to the value for damage purposes the benefits proposed for the properties that were carved out of the dedicating tracts will be extinguished under any method of applying the credit.

For the land condemned from Lot 13, 512.93 square feet, the jury awarded \$720.00, which is at the rate of about \$1.40 per square foot. For land divided from this condemned land by only a curb stone the testimony was that it was worth no more than 15 cents a square foot and the jury certainly allowed no more than this rate.

Why this difference? Is land on one side of a curb worth nine times as much as land on the other side of it? Is land that is to become part of a street worth more than land adjoining it that is already in the street, especially where the land that is to go into the street is already restricted against building?

If \$1.40 per square foot was a right valuation for the land taken it is a right valuation for adjacent land dedicated. There are over 72,000 square feet in the part of Van Ness Street that was dedicated and if this be allowed for at \$1.40 per square foot the total credit due somebody would be \$100,800, or nearly ten times the total benefits found. Even at \$1.00 per square foot the total credit would be seven times the total damages. Under any method of applying such a credit the benefits to lot owners entitled to credit would certainly be more than extinguished.

VI. The Assessment of Supposed Benefit Against The Washington City Orphan Asylum and Other Land West of Wisconsin Avenue is so Unreasonable as to Constitute Obvious Error.

Separately on behalf of The Washington City Orphan Asylum counsel for that appellant submits the following:

Reference is made to the Fourth, Fifth, Sixth, Seventh and Eighth assignments of error of defendant, The Washington City Orphan Asylum (Rec. p. 46). The Washington City Orphan Asylum is the owner of Parcel 34/92 and Lot 800 in Square 1724. This property fronts on Nebraska Avenue which is a distance of over 1200 feet from the northeast corner of Wisconsin Avenue and Van Ness Street, where the property condemned is located. According to the affidavits of A. C. Houghton (Rec. p. 31), Arthur Carr (Rec. p. 34) and William C. Miller (Rec. p. 44) the Asylum buildings are so located that the tract of fourteen acres will be used for that purpose for an indefinite period.

When Van Ness Street was opened from Wisconsin Avenue to 45th Street and 43rd and 45th Streets were widened, this property was assessed \$1500 benefits in District Court Case No. 1947 and no benefits were assessed in that case east of Wisconsin Avenue. In the present case, this property is assessed \$500 benefits for widening Van Ness Street fifteen feet beginning on the east side of Wisconsin Avenue and running along the north side of Van Ness Street to a public alley, a distance of about eighty-five feet. This defendant had no property within the land to be condemned and was not notified by the service of process. It was notified finally by the District Commissioners that there had been an assessment against its property which is located

at Nebraska Avenue and Van Ness Street, 1200 feet west of the property condemned.

It seems difficult to imagine upon what theory the jury could have operated when it assessed The Washington City Orphan Asylum for benefits as a result of the taking of this small strip of land east of the property which it owned. The taking of this property did not enlarge the roadway and therefor the jury could not have considered that the property west was given an outlet to either Connecticut Avenue or the center of the city. All it purported to do was to prevent a building from being erected on the fifteen feet on the east side of Wisconsin Avenue at Van Ness Street and Lot 13 of the strip sought to be condemned in these proceedings was already restricted against building at the time of the institution hereof. Whatever desire an occupant of the Asylum's property had to get into the city or the States of Maryland or Virginia could be well served by the thoroughfares Nebraska Avenue and Massachusetts Avenue and Van Ness Street west of Wisconsin Avenue and were in no way improved by the taking of the condemned property.

An assessment against The Washington City Orphan Asylum, therefore, it is respectfully submitted, was without any possible reason or foundation and is only another evidence of the illogical way in which the jury proceeded to make its assessment.

In assignment of error No. 6 (Rec. p. 47) there is pointed out the unreasonable and illogical assessment of benefits by the jury in assessing one side of Veazey Street for benefits and not assessing the other, when both sides were equally benefitted.

Separately on behalf of Christian Heurich and Christian Heurich, Jr., counsel for these appellants submit the following:

These appellants' objections and exceptions are in the addition to the record per stipulation. Their land assessed for benefits all lies west of Wisconsin Avenue and consists of parcel 39/91 which adjoins that of The Washington City Orphan Asylum and to which like considerations apply, and of parcels 34/82 and 34/80, which are diagonally opposite and directly opposite Lot 801, being the corner properties on the west side of Wisconsin Avenue, and parcel 33/42 which lies between 34/82 and the parcel adjacent to The Washington City Orphan Asylum. As to parcels 34/82 and 34/80 we submit that it is inconceivable that they should be benefitted if the uncondemned portion of Lot 801 was not benefitted. There was no testimony tending to show any distinction between these three corner properties, and could be none excepting that it is less likely that any benefit would result to these corner properties which are on the west side of Wisconsin Avenue.

To avoid repetition these appellants, The Washington City Orphan Asylum and the Heurichs, adopt the statements made in this brief on behalf of the other appellants, so far as they are applicable, that is to say, excepting the matter of the credits for the dedication of Van Ness Street dealt with under headings IV and V.

VII. The Failure to Assess Benefits Against the Uncondemned Portion of Lot 801 is Arbitrary and Discriminatory.

It is strikingly noticeable too in this proceeding of so many irregularities that the verdict of the jury (Rec. p. 10 et seq.) neither finds nor assesses any benefits whatsoever against the uncondemned portion of Lot 801 Square 1831, although that remaining portion

would obviously benefit from the widened street if any land would.

The jury was instructed (instruction numbered 6, Rec. p. 63) that it "must not assess benefits arbitrarily," and, by instruction numbered 7, that "you shall not take into consideration, in making your award for the part taken, any benefits that may accrue to the remainder thereof, but such benefits shall be considered by the jury in determining what assessment, if any, shall be made or levied against such part of such lot, piece or parcel of land, as may not be taken".

It is true that there is no evidence of any benefit to the uncondemned portion of Lot 801, and it may therefore be argued by the appellee that the jury was accordingly powerless to find any such benefit because of its instruction numbered 10. But whether the fault be with the jury or with the petitioners witnesses the result is arbitrary and discriminatory.

CONCLUSION

In conclusion we respectfully submit that regardless of whether or not the public moneys unlawfully paid out by way of damages in this proceeding can ever be recovered, the appellants here cannot be called upon to make good that loss; or to pay for land unlawfully and unnecessarily condemned; or be discriminated against by assessments where the owner of the uncondemned portion of Lot 801 (the most benefitted lot of all) is freed of assessment; or be denied credit for a dedication many times more valuable than the land condemned.

It was too late when appellants were brought into court to prevent the Commissioners from spending public money on this condemnation, but it is not too late to call a halt upon their attempt to make the

appellant property owners pay for their discriminatory, unnecessary and unlawful acts.

Respectfully submitted,

DION S. BIRNEY,

PAUL E. LESH,

Attorneys for William J. Nealy and others.

C. CLINTON JAMES,

Attorney for Washington City Orphan Asylum.

FRANK J. EHRHARDT,

*Attorney for Christian Heurich and
Christian Heurich, Jr.*

FOR MR. JUSTICE GRONER

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC 17 1933

No. 5962

Henry H. Stodges

CLERK

**In the Court of Appeals of the District of
Columbia**

APRIL TERM 1933

WILLIAM J. NEALY ET AL., APPELLANTS

vs.

**LUTHER H. REICHELDERFER ET AL., COMMISSIONERS
OF THE DISTRICT OF COLUMBIA, APPELLEES**

BRIEF FOR APPELLEES

WILLIAM W. BRIDE,
Corporation Counsel, D.C.,

VERNON E. WEST,
Principal Assistant Corporation Counsel, D.C.,

WALTER L. FOWLER,
*Assistant Corporation Counsel, D.C.,
Attorneys for Appellees, District Building.*

INDEX

SUBJECT INDEX

	Page
Statement of facts-----	1
Argument-----	5
I. The Dedication of Part of Parcel 34/36 was properly accepted-----	5
II. These proceedings were instituted in accordance with the plan of the permanent system of highways-----	8
III. Appellants, not being the owners of property con- demned, are not in a position to raise the question as to whether these proceedings were in conformity with the highway plan-----	20
IV. Appellants, if entitled to question the propriety of these proceedings have done so too late-----	23
V. The condemnation of part of lot 13 was proper-----	33
VI. In the matter of the credit for the dedication of Van Ness Street there is no error-----	35
VII. The testimony as to the value of the land dedicated for Van Ness Street was fair and reasonable-----	40
VIII. There is no showing in this record that the assess- ments for benefits levied against appellants' prop- erty were not just and reasonable-----	43
IX. The uncondemned portions of lot 801 and lot 13 were not benefited-----	48
Conclusion-----	49

AUTHORITIES CITED

<i>Bauman v. Ross</i> , 167 U.S. 548-----	21, 45
<i>Briggs v. Brownlow</i> , 49 App.D.C. 345-----	39
<i>Columbia Heights Realty Co. v. Rudolph</i> , 217 U.S. 547, 560-----	24, 47
<i>Concord Improvement Co. v. Reichelderfer</i> , 61 W.L.R. 356-----	47
20 Corpus Juris, section 121-----	21
<i>D.C. v. Washington Steel & Ordnance Co.</i> , 43 App.D.C. 344-----	34
<i>Dougherty, et. al. v. Galligher</i> , 58 App.D.C. 166-----	15
<i>Garfield Memorial Hospital v. Macfarland</i> , 31 App.D.C. 447-----	43
<i>Kansas City Ry v. Road District</i> , 266 U.S. 377-----	45
<i>Louisville & N. R. Co. v. Barber Asphalt Paving Co.</i> , 197 U.S. 430, 434-----	45
<i>Macfarland v. Elverson</i> , 32 App.D.C. 81-----	34
<i>Martin v. D.C.</i> , 205 U.S. 135-----	13

II

	Page
<i>Mitchell v. Reichelderfer</i> , 61 App.D.C. 50_____	29
<i>National Savings & Trust Co. v. Reichelderfer</i> , 61 App.D.C. 38__	27
<i>Neuman v. Neuman</i> , 42 App.D.C. 588_____	9, 13, 21, 24
<i>North Laramie Land Co. v. Hoffman et al.</i> , 268 U.S. 276, 283__	27
<i>Phillips v. United States</i> , 40 App.D.C. 261_____	47
<i>Seufferle v. Macfarland</i> , 28 App.D.C. 94_____	47
<i>Shannon & Luchs Const. Co. v. Reichelderfer</i> , 61 App.D.C. 36__	23
<i>Smith v. Gotwals</i> , 61 App.D.C. 304_____	33
<i>Valley Farms Co. v. Westchester</i> , 261 U.S. 155_____	45
<i>Wash. Ry. & Elec. Co. v. Neuman</i> , 41 App.D.C. 440_____	21
<i>Weigand v. Siddons</i> , 41 App.D.C. 130_____	47
<i>Wight v. Davidson</i> , 181 U.S. 371_____	26

STATUTES CITED

D.C. Code of 1929:

Title 12, Sec. 7_____	1
Title 12, Sec. 8_____	6
Title 12, Sec. 16_____	2, 10
Title 25, Sec. 31_____	8, 10
Title 25, Sec. 36_____	10
Title 25, Sec. 54_____	24
Title 25, Sec. 56_____	28
Title 25, Sec. 58_____	36
Title 25, Sec. 59_____	30
Title 25, Sec. 71_____	4, 28
Title 25, Sec. 85_____	12
Title 25, Sec. 452_____	6

In the Court of Appeals of the District of Columbia

APRIL TERM 1933

No. 5962

WILLIAM J. NEALY ET AL., APPELLANTS

vs.

LUTHER REICHELDERFER ET AL., COMMISSIONERS
of the District of Columbia, appellees

BRIEF FOR APPELLEES

STATEMENT OF FACTS

This is an appeal from an order entered in the Supreme Court of the District of Columbia in a condemnation proceeding ratifying and confirming the verdict of a jury assessing benefits against appellants' properties for the widening of Van Ness Street, at its intersection with Wisconsin Avenue, Northwest.

This street is shown as being 90 feet in width on the permanent plan of highways prepared under authority of the Act of Congress of March 2, 1893, as amended (D.C. Code of 1929, Title 12, section 7, et seq.). (See appellants' brief, page 3.)

On February 10, 1923, a subdivision of tracts of land was filed for record in the office of the Surveyor of the District, which, in accordance with statute, dedicated land for the streets shown on the highway plan lying within the subdivision. (See Exhibit "B" opposite page 66 of the Record.) The owners of the subdivision did not dedicate Van Ness Street in fee to the full width of 90 feet, but made a dedication in fee of 60 feet in width, and established a building restriction line on each side of 15 feet, as permitted by the Act of Congress of May 31, 1900 (31 Stats. 248; D.C. Code of 1929, Title 12, section 16). Parcel 34/36 (later known as lot 800 and now lot 801), being in a separate ownership, was not included in the subdivision above referred to. (See appellants' brief, page 4.)

Thereafter, on May 31, 1927, the then owner of Parcel 34/36 dedicated in fee to the District a portion of this lot lying within the limits of Van Ness Street. (See Exhibit "A" opposite page 66 of the Record.) It will be noted that this dedication did not include the establishment of a 15 foot building restriction line, nor did it include the portion of the land occupied by a house lying within the 60 foot line of Van Ness Street. It is contended by counsel for appellants that this dedication was accepted by the Commissioners illegally, a contention which will be discussed under Point I of this brief.

On May 11, 1932, appellees filed a petition in the Supreme Court of the District of Columbia for

the condemnation in fee of a part of lot 801, Square 1831, and a part of lot 13 in the same square, as shown on the plat opposite page 6 of the Record. In conformity with law, service was had upon the owners of the land to be condemned and a notice given by publication under order of court that these proceedings had been filed to "empanel a jury in accordance with the law provided for in such cases to assess the damages each owner of land to be taken may sustain by reason of the said widening of Van Ness Street at its intersection with Wisconsin Avenue, Northwest, in the District of Columbia, and the condemnation of the land necessary for the purposes thereof, and to assess the benefits resulting therefrom, plus all or any part of the costs and expenses of said proceedings, upon any lands which the jury may find will be benefited", and that the court had "ordered that all persons having any interest in these proceedings, be and they are hereby warned and commanded to appear in this Court on or before the 5 day of April, 1932, at ten o'clock A.M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn herein;" (Record pages 6, 7).

Property owners whose lands were to be condemned appeared through counsel (Record page 54).

It was alleged in the petition filed by appellees (Record page 3) that the widening of Van Ness Street here involved was in accordance with the permanent system of highways, and, without objection, evidence was offered (Record page 55) to prove this fact.

On August 10, 1932, the jury returned its verdict allowing damages of \$11,500 for the land taken, and fixing the costs and expenses of the proceeding at \$595.24, making a total of \$12,095.24. The jury assessed benefits totaling \$6,682.00 against other lands (Record pages 10-13). On August 31, 1932, the Court ratified the verdict of the jury in all respects, except as to benefits assessed against land no part of which was taken in these proceedings (Record page 13). Thereafter, notice was given in conformity with the Act of Congress of May 29, 1928, (45 Stats. 953; D.C. Code of 1929, Title 25, section 71) to the property owners assessed for benefits (Record pages 14, 15). The appellants then appeared through counsel and filed objections and exceptions to the verdict (Record page 26) which were overruled by the Court on January 16, 1933, and an order was entered ratifying and confirming the verdict in all respects, except as to Parcel 34/90 which is not involved in this appeal (Record page 44). From this order appellants have appealed to this Court.

ARGUMENT**POINT I****THE DEDICATION OF PART OF PARCEL 34/36 WAS
PROPERLY ACCEPTED**

Counsel for appellants, in an endeavor to create an impression that the Commissioners of the District have improperly favored the owner of lot 801, formerly Parcel 34/36, throughout their brief continually refer to the owner thereof as the "favored owner" and to the fact that when the owner of this lot made a dedication in fee of a portion thereof on May 31, 1927, the Commissioners did not require him to establish a 15-foot building restriction line. It may be well at this time to state that the owner of this property at the time of the dedication (See Exhibit "A" opposite page 66 of the Record) was not the owner when these proceedings were instituted. (See Record page 4.) Counsel for appellants contend that the acceptance of this dedication without a building restriction line was illegal and that had the Commissioners required the establishment of such building line these proceedings would have been unnecessary.

But counsel for appellants fail to point out wherein the acceptance of the dedication was illegal or by what authority the Commissioners could have required the establishment of a building line. There is no law requiring any property owner to dedicate land to the District for street purposes unless he desires to record a subdivision. Section

2 of the Act of March 2, 1893, (27 Stats. 532, as amended by the Act of Congress of April 30, 1926, 44 Stat. 374; D.C. Code of 1929, Title 12, section 8) after providing for the preparation of a map showing a permanent system of highways, provides:

* * * and after such map shall have been so recorded no further subdivision of any land included therein shall be admitted to record in the office of the Surveyor of said District, or in the office of the Recorder of Deeds thereof, unless the same be first approved by the Commissioners and be in conformity to such map.

The Act of Congress of March 3, 1901, (31 Stats. 1428, D.C. Code of 1929, Title 25, section 452) provides:

All spaces on any duly recorded plat of land thereon designated as streets, avenues, or alleys shall thereupon become public ways, provided they are made in conformity with section 442 of this Title.

Section 442 merely authorizes the Commissioners to make orders regulating the platting and subdivision of lands.

Had the owner of this parcel of land undertaken to record a subdivision, the Commissioners could and would have required him to make his dedication in conformity with the highway plan. But he never undertook to record a subdivision. All he did was to make gifts to the District of certain land which permitted the opening of Van Ness

Street and of other land which permitted the widening of a public alley. The Commissioners could not require him to give more. The reason the property owner did not give more is apparent from the dedication plat (Exhibit "A" opposite page 66 of the Record) which shows the location of the house on Parcel 34/36.

But appellants contend that the Commissioners should have said to this property owner, If you will not give us all of the land we want we will take none. This would have necessitated the condemnation of this additional land in these proceedings at an increase in the damages paid the owner of the property taken, with the resulting increase in the assessments levied against these appellants. The Commissioners, in accepting this dedication, did not act for the benefit of the owner of said parcel, now lot 801, but for the benefit of the other property owners in the vicinity and the public at large. Good administration and common sense require that when a property owner is willing to make a gift to the District of land which the District needs, and the Commissioners are without authority to require more, they should accept what is offered even though they may desire additional lands which the property owner is not willing and cannot be required to give.

But it is immaterial in this case whether the Commissioners should or should not have accepted this dedication. Since the Commissioners had no

power to require the property owner to establish a building restriction line their acceptance of the dedication without such line cannot affect their right to maintain these proceedings.

POINT II

THESE PROCEEDINGS WERE INSTITUTED IN ACCORDANCE WITH THE PLAN OF THE PERMANENT SYSTEM OF HIGHWAYS

It is true that in the subdivision recorded February 10, 1923, Van Ness Street between Wisconsin Avenue and 38th Street, was dedicated in fee to a width of 60 feet, except where it abuts lot 801 (then Parcel 34/36), and a 15-foot building restriction line established. This, however, did not prevent the Commissioners from instituting the present proceedings to condemn a part of lot 13 and a part of lot 801. Counsel for appellants contend that the Commissioners could and should have instituted proceedings merely to condemn a building restriction line through lot 801. In the first place, counsel for appellants overlook the fact that a portion of lot 801 lies within the 60-foot width of Van Ness Street and that portion could have been acquired only by condemnation. In the second place, they overlook the fact that the Act of Congress of June 21, 1906, (34 Stats. 384; D.C. Code of 1929, Title 25, section 31) only authorizes the Commissioners to establish building lines on streets less than 90 feet wide. Section 1 of said Act reads as follows:

The Commissioners of the District of Columbia be, and they are hereby, authorized to establish building lines on streets or parts of streets less than ninety feet wide, in the District of Columbia, upon the presentation to them of a plat of the street or part of street upon which such action is desired, showing the lots and the names of the record owners thereof, and accompanied by a petition of the owners of more than one half of the real estate shown on said plat requesting that building lines be established, or when the Commissioners deem that the public interests require that such building lines be established: Provided, that no such building line shall be established on any part of street less than one block in length.

The street here involved is conceded to be a highway plan street of 90 feet in width.

The case of *Newman vs. Newman*, 42 App.D.C. 588, which counsel for appellants cite as authority for their contention, is not in point, for there the building line condemned was on a 60 foot minor street, as appears from the record in that case. It may be contended by appellants that this limitation in the Act of 1906 prohibiting the Commissioners from establishing building lines on any street with a width of 90 feet or greater has no application here for the reason that the portion of this street actually opened opposite lot 801 at the time of these condemnation proceedings was less than 90 feet in width. But it was a 90 foot street on the highway

plan. Could the District institute a proceeding to condemn land for a 90 foot highway plan street by taking 60 feet in width and establishing a building restriction line of 15 feet on each side thereof? We submit it could not, and the District has never supposed it could. And the reason is that the building line to be established by dedication under the Act of Congress of May 31, 1900 (31 Stats. 248; D.C. Code of 1929, Title 12, section 16), is quite a different building restriction line from that which the District may establish by condemnation under sections 31 to 36, Title 25, of said Code. Section 2 of the Act of 1900 reads as follows:

In order to facilitate the extension of streets and encourage the donation of land in accordance with the plans for the permanent system of highways, the Commissioners of the District of Columbia are authorized, whenever in their judgment it may seem proper, to accept the dedication of streets shown on said plans, and record same, under the following conditions, namely: Streets which are shown as ninety feet in width on said plans may be accepted with a width of not less than sixty feet: *Provided*, That the parties dedicating same agree to establish building restriction lines to agree with the street lines as shown on said plans; and streets shown on said plans as one hundred and twenty feet or more in width may be accepted with a width of not less than ninety feet: *Provided*, That the parties dedicating

same agree to establish building restriction lines to agree with the street lines as shown on said plans: *And provided further*, That the space between the street lines, as established under the terms hereof, and the building restriction lines shall be considered as private property set aside and to be used for parking purposes: *But provided further*, that the parties so dedicating shall agree that said parking shall be subject to the regulations of said Commissioners in regard to height of parking and the projection of buildings beyond the building line, and that the District of Columbia shall have a right of way through said parking for sewers and water mains free of cost, and to lay thereon sidewalks, if, in the judgment of said Commissioners, the space between street lines is not sufficient to admit the construction of such sidewalks within said lines.

It will be noted that under the Act above quoted, when the building restriction line is established by the property owners, "the District of Columbia shall have a right of way through said parking for sewers and water mains free of cost, and to lay thereon sidewalks, if, in the judgment of said Commissioners, the space between street lines is not sufficient to admit the construction of such sidewalks within said lines." The provisions of law relative to the establishment of building restriction lines by condemnation give no such rights to the Commissioners. Hence, if the Act of 1906, be con-

strued as permitting the Commissioners in this case to condemn a building restriction line through lot 801, and after the same was condemned it became necessary to lay sidewalks, sewers or water mains upon Van Ness Street within the limitations of the building lines established, such sidewalks, sewers or water mains could not be extended through the privately owned land between the restriction line and the street. Certainly it was not the intention of Congress that building lines of different characteristics or that building lines giving to the District different rights should be established on the same street.

Another reason is apparent why Congress did not intend that the Commissioners should be required to establish building lines by condemnation on a highway plan street, (none of which are less than 90 feet in width) in order to make the same conform with the plan. The opening of an alley or minor street is a purely local benefit, whereas the opening of a major street, while it unquestionably is a local benefit, is also a benefit to the public at large. Therefore, in the statute authorizing the condemnation of land for the opening, extension, widening and straightening of alleys and minor streets (Act of February 23, 1905, 33 Stats. 736, as amended by the Act of March 3, 1917, 39 Stats. 1017; D.C. Code of 1929, Title 25, section 85) it is provided that the jury must find the benefits to equal the damages including the expenses of the

proceeding: otherwise the condemnation fails. *Martin v. District of Columbia*, 205 U.S. 135. But no such limitation is found in the Act relating to the condemnation of land for major streets. If the damages exceed the benefits the District pays the difference. The statute relating to the establishment of building lines by condemnation provides that the proceedings therefor shall be in the manner provided for the condemnation of land for alleys and minor streets. Where, as here, the establishment of a building line by condemnation would involve the removal of a building the owner is entitled to be compensated therefor. *Newman vs. Newman*, 42 App.D.C. 588. Certainly Congress did not intend that the widening of a major street to the width required by the highway plan should fail because the damages were in excess of the benefits. It will be noted in this case that the witness Grady, who was the only one to testify as to the value of the building, stated (Record page 57) that the damage thereto resulting from the taking would amount to \$9,220.00. The jury awarded the owner of lot 801 as damages for the land taken and the building \$10,780.00, and the cost of the proceedings amounted to \$595.24. The total assessments for benefits amounted to but \$6,882.50.

Hence it follows that, if in a case of this character, the District cannot maintain a proceeding to condemn the land itself, the District can never widen the street to the width required by the high-

way plan if the property owners on one side of the street have subdivided a tract of land and established a building restriction line. Suppose for example the land in Square 1829 and the south 45 feet in width of Van Ness Street, as shown on the highway plan, had been an undivided tract in a single private ownership. When the owner subdivided this square he would be required to dedicate the land for Van Ness Street to the extent that his tract lay within that street, either by giving the entire 45 feet to the District or by giving the north 30 feet and establishing a building restriction line. If he elected to follow the latter course, the street, under appellants' contention, could never be opened, unless the owner of the tract on the north should record a subdivision thereof, and make the required dedication. Counsel for appellants say that the 45 feet to the north could not be condemned because if a building line is on the south there must be an equivalent building line on the north, but the statute prohibits the Commissioners from condemning a building line on a 90-foot street. Such a building line can be established only by a dedication. If appellants are correct, a property owner, by the establishment of a building line on one side of a 90-foot street, may prevent the opening of that street.

In the case of *Newman vs. Newman*, supra, where the District sought to establish a building line on a minor street of 60 feet in width, the contention

was made that the Commissioners were without power to maintain the same for the reason that a building line existed by dedication running through part of the block and the statute contained a provision "that no such building lines shall be established on any part of street less than one block in length." In denying this contention the Court said:

* * * The prohibition upon which this contention is based was obviously intended to prevent the establishment of a building line less than one block in length, but certainly it was not contemplated by Congress that, because one resident in a block is sufficiently public spirited to dedicate land opposite his residence for a building line, the Commissioners are then powerless to establish a building line the entire length of the square. Such an interpretation of this Act would make it possible for the owner of a 25 foot lot, by establishing a building line as to that lot, to defeat the establishment of a building line for the block. The condition aimed at by Congress, namely, a building line less than a block in length, would thereby be established and the very purpose of the act defeated. The building line established by these proceedings extends the length of the block. * * *

Counsel for appellants rely upon the decision of this Court in the case of *Dougherty et al. vs. Gallagher*, 58 App.D.C. 166. The street there involved

was originally a 90-foot street under the permanent system of highways, and the property owners, in accordance with law, had dedicated their land in fee for a width of 60 feet and established the required 15-foot building restriction lines. After accepting this dedication the Commissioners, under authority of law, changed the highway plan for this street to 120 feet in width and thereupon sought to condemn in fee an additional 45 feet of land in width on one side of the street, attempting to consider the 15-foot parking on one side to be public property and the 15-foot parking on the other to be private. Upon objection promptly interposed by an answer filed by a property owner whose land was to be taken, this court held that that proceeding was not in conformity with the highway plan. When the District undertook to widen the street from 90 feet to 120 feet on the highway plan it, in effect, created a new street. It was not the street for which the building restriction lines were established. The condemnation proceedings in that case were not, as here, to make the remainder of the street, after a partial dedication and the establishment of building restriction lines, conform with the highway plan as it existed at the time of the partial dedication, but were to widen the street in conformity with the new plan. Under the statutes hereinabove referred to, the District could widen the street, in the absence of a dedication on the part of the property owners, only

through condemnation proceedings which would bring the full width of the street into public ownership.

To reiterate, in the *Galligher case* the land for the street had been dedicated in accordance with the law to the width required by the highway plan and the Commissioners were undertaking, after a change in the plan, to widen the street. Unless the property owners were willing to make a new dedication, the widening of the street could only be accomplished by condemning in fee to the full width. In this case the Commissioners were merely attempting to make the street conform to the highway plan as it existed at the time the dedication of 1923 was made and were proceeding by the only method by which that result could be accomplished.

In the *Galligher case* the building restriction line on one side, being identical with the building restriction line on the other, and having been established for the same purpose, could not be treated differently in that proceeding. Referring to the action of the District in that case the Court said:

* * * This parking space on the south side of the street is treated in appellants' petition as private property, for it is included in the land to be condemned; but, in order to make the street 120 feet in width, the parking space on the north side is treated in the petition as public property, although it is of precisely the same character as that on the south side.

But here, even assuming that the Commissioners have the power to condemn a building restriction line in lot 801, the building line so condemned would be, as we have heretofore pointed out, of an entirely different character from the one established by dedication in the remainder of the block.

Although counsel for appellants, in their brief, contend that the only proper procedure to be adopted by the Commissioners in this case was the establishment of a building restriction line through lot 801, they may contend in the argument at bar that the Commissioners should, in this proceeding, in addition to the land taken, have also condemned in fee all of the land on this street lying within the building restriction lines as established by dedication. But such a procedure would be clearly contrary to the intent of Congress. Prior to the Act of 1900, one seeking to record a subdivision which embraced land included within a highway plan street was required to dedicate in fee for the full width of that street. This Act permitted the Commissioners to accept a dedication of a street of a width less than that shown on the highway plan provided proper building lines were established giving to the Commissioners the right to lay sidewalks, water mains and sewers therein. Such building lines so established would be of little value to the District, if, when it became necessary to complete the opening of the street, the fee in the land lying within the building lines must be condemned

at the expense of the taxpayers of the District, with possible assessments for benefits upon property owners in the vicinity. Certainly this was not what Congress intended by the Act of 1900.

It may also be contended by counsel for appellants that the District could have made this proceeding conform to the highway plan by condemning in fee, in addition to the land described in the petition, so much of lot 19, in Square 1829, within the building line as lies immediately opposite the land here involved. This would have been a useless thing and would only have increased the cost to the District and the benefit assessments against neighboring properties. To show how technical this position would be, if the Commissioners should undertake to condemn the land within the building restriction line opposite the property taken in these proceedings, the proceeding would fail if the portion of lot 19 taken did not coincide to the linear foot, or even to the linear inch, with the land actually taken herein.

The situation here presented is not an unusual one. It is constantly arising. By a reference to the plat opposite page 6 of the record it will be seen that a similar situation exists on Van Ness Street at the intersection of 37th Street, where all of the street on the south side for a distance of approximately 130 feet is in public ownership, while on the north side there is a building restriction line. The same situation will be seen to exist on Upton Street

at the intersection of Wisconsin Avenue. On Exhibit "B", opposite page 66 of the record, it will also be seen that similar conditions exist on 39th Street at Warren Street; on 38th Street at Windom Place; and on Yuma Street at 38th Street. On Windom Place at 38th Street is an illustration of where the owners on the south side of the street have subdivided and established a building restriction line, whereas the property on the north side remained unsubdivided and therefore no land for the street was dedicated or a building restriction line established. If this unsubdivided tract were never subdivided and the Commissioners could not condemn land to establish a street because of the existence of the building restriction line on the south, the street could never be made to conform to the highway plan. Congress unquestionably intended that all major streets should be of the width shown on the highway plan. To sustain the position taken by appellants would defeat that intention.

POINT III

APPELLANTS, NOT BEING THE OWNERS OF PROPERTY CONDEMNED, ARE NOT IN A POSITION TO RAISE THE QUESTION AS TO WHETHER THESE PROCEEDINGS WERE IN CONFORMITY WITH THE HIGHWAY PLAN

It must be remembered that these proceedings are dual in character. First, they are proceedings for the taking of land under the power of eminent domain, and, second, they are proceedings for the assessment of benefits under the power of taxation.

Bauman vs. Ross, 167 U.S. 548; *Washington Railway and Electric Company vs. Newman*, 41 App. D.C. 440.

Appellants, not being the owners of any land condemned, are not concerned with the question whether the taking is in conformity with the highway plan. The property was taken without any objection on the part of the owners thereof. The verdict of the jury awarding damages for the land taken was confirmed by the Court and the improvement now exists from which the appellants have received benefits. The only question with which they are concerned is whether the verdict of the jury is, as to the respective amounts to which they have been assessed, unjust or unreasonable.

In the case of *Newman vs. Newman*, 42 App.D.C. 588, this Court said:

The further question now for the first time is attempted to be raised, whether the party whose land is to be taken by proceedings under eminent domain is entitled to have his compensation ascertained by a common-law jury. **In the first place, those whose land was condemned are not raising this question;** and in the second, appellant, by proceeding before the jury of five without raising it, now is estopped to do so."

In 20 Corpus Juris, under the heading of Eminent Domain, section 121, it is said:

The owner of property to be taken or affected by the exercise of the power of eminent domain may raise the objection that the

condemning corporation or body is exceeding its powers, but such objection cannot be raised by a third person not interested in the property.

But counsel for appellants say in their brief (page 11) that it is "shocking" to hear this contention made since "the Commissioners appear to have been acting throughout in conformity with the wishes of the parties whose land is condemned." This statement is neither justified by anything appearing in the record or by the true facts. It does appear in the record (page 59) that the owner of lot 801 had prepared plans for a store which was to be put on this lot "which store was to stand out 15 feet further than the building restriction line," as established on adjacent lots. With this in the record, is it not fair to assume (and such assumption is in accord with the true facts) that the Commissioners, upon learning of the plans of the property owner, instituted these proceedings, over his protest, to protect these very appellants from a condition which would have damaged their properties. Had the Commissioners neglected to do what they have done in these proceedings, it is quite probable the appellants who are now complaining against the assessments would even more bitterly complain of the neglect of the Commissioners. That many of these property owners are not "shocked" to the same extent as counsel, is apparent from the fact that they have paid the assessments levied against

them, as appears from the motion filed herein to dismiss this appeal as to certain of the appellants.

POINT IV

APPELLANTS, IF ENTITLED TO QUESTION THE PROPRIETY OF THESE PROCEEDINGS, HAVE DONE SO TOO LATE

Even assuming for the sake of argument that appellants could object to these proceedings on the ground they are not in conformity with the highway plan, their objection not being made until after verdict, comes too late.

In the case of *Shannon and Luchs Construction Company vs. Reichelderfer*, 61 App.D.C. 36, a property owner, part of whose land was taken in condemnation proceedings, after verdict filed a motion to dismiss the petition on the ground that the proceedings were not in conformity with the highway plan. In holding that this motion came too late this Court said:

Nor was appellant's motion to the effect that the extension of Evarts Street did not conform with the plan of the permanent system of highways timely. This fact was alleged in the petition and not denied by the defendants. A witness on behalf of the District testified, without objection, that the streets, as delineated on the map attached to the petition, conformed to the plan of the permanent system of highways. No evidence was offered by appellants on this phase of the case. **Accompanying the mo-**

tions is an affidavit on which it is attempted, after verdict, to retry an issue of fact already determined by the jury. The motion was properly denied. *Columbia Heights Realty Company vs. Rudolph*, 217 U.S. 547; *Newman vs. Newman*, 42 App. D.C. 588.

In the instant case the petitioners alleged conformance with the permanent system of highways. This was not denied by answer and without objection evidence was offered to prove this averment. No evidence was offered by appellants. The only distinction between the case above cited and the case at bar is that there a property owner whose land had been taken sought to raise the question, while here the question is sought to be raised by persons assessed for benefits but no part of whose land was taken in the condemnation proceedings. But we submit there is no difference in principle between the two cases.

Section 491c of the Code of 1901 (D.C. Code of 1929, Title 25, section 54) provides as follows:

The said court shall cause public notice of not less than twenty days to be given of the institution of such proceeding by advertisement in three daily newspapers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceeding to appear in Court at a day to be named in said notice and to continue in attendance until the Court shall have made its final

order ratifying and confirming the award of damages and the assessment of benefits by the jury herein provided for; and in addition to such public notice the said court shall cause a copy of said notice to be served by the United States marshal for the District of Columbia, or his deputies, upon such owners of the land to be condemned as can be found by said marshal, or his deputies, within the District of Columbia and upon the tenants and occupants of the same. The said court shall appoint a guardian ad litem for any person interested in the proceeding who may be under disability.

In conformity with this statute, notice was given by publication of the filing of the petition, and that a jury would be empaneled "to assess the damages each owner of land to be taken may sustain by reason of the said widening of Van Ness Street at its intersection with Wisconsin Avenue, Northwest, in the District of Columbia, and the condemnation of the land necessary for the purposes thereof, and to assess the benefits resulting therefrom, plus all or any part of the costs and expenses of said proceedings, upon any lands which the jury may find will be benefited" and giving further notice that the Court had "ordered that all persons having any interest in these proceedings, be and they are hereby warned and commanded to appear in this Court on or before the 5 day of April, 1932, at ten o'clock A.M., and continue in attendance until the Court shall have made its final order ratifying and

confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn herein.” (Record pages 6, 7.)

In the case of *Wight vs. Davidson*, 181 U.S. 371, where it was contended by property owners assessed for benefits that the condemnation statute was void because it did not provide for notice to them of the assessments, Mr. Justice Shiras in delivering the opinion of the Court said:

It is also established by those authorities that, in proceedings of this nature, notice by publication is sufficient; and it accordingly follows that the order of publication, in the newspapers named, by the supreme court of the District gave due notice of the filing of the petition and an opportunity to all persons interested to show cause, if any they had, why the prayer of the petition should not be granted. Such notice also must be held to have operated as a notice to all concerned of the pending appointment of a jury, and that proceedings under the Act of Congress would subsequently be had. This gave an opportunity for interested parties to attend the meetings of the jury, to adduce evidence, and be heard by counsel. The return of the marshal shows that some, at least, of the property owners appeared before the jury, produced witnesses, and were heard by counsel. **If the appellees did not avail themselves of these opportunities, the court and jury, proceeding according to law, were not to blame.**

In the case of *North Laramie Land Company vs. Hoffman, et al.*, 268 U.S. 276, 283, the Court, in referring to statutes providing for notice by publication in matters relating to the taxation or condemnation of land, said:

* * * Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. **Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice.** * * *

In the case of *National Savings and Trust Company vs. Reichelderfer*, 61 App.D.C. 38, which also involved the question of sufficiency of notice by publication, this Court said:

It is a general rule of law that statutes relating to taxation or condemnation of land are general in their application, and the owners of land are presumed to have notice of their provisions. To that end the procedure may be somewhat summary in character, provided only that the notice shall give sufficient time to enable the parties affected to appear and protect their rights. *North Laramie vs. Hoffman*, 268 U.S. 276; *Huling vs. Kaw Valley Railroad and Improvement Company*, 130 U.S. 559; *Ballard vs. Hunter*, 204 U.S. 241.

There is, therefore, no question but that the appellants here are charged with notice of the pend-

ency of these proceedings and of the fact they might be assessed for benefits therein. It is equally clear that appellants, if they had any right to question the propriety of these proceedings, had a right to question it at the trial, and before verdict.

It is interesting to note that B. F. Saul Company, which was the true owner of lot 13, a part of which was condemned, also appeared to protect its interest in properties assessed for benefits and upon which it held trusts. (Record page 64.)

Section 491e of the Code of 1901 (D.C. Code of 1929, Title 25, section 56) provides in part that:

After the jury shall have been organized and shall have viewed and examined the land and premises affected by the condemnation proceeding they shall proceed, in the presence of the court, to hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having any interest in the proceeding.

Counsel for appellants contend that under the Act of Congress of May 29, 1928 (45 Stats. 953; D.C. Code of 1929, Title 25, section 71, quoted in appellants' brief page 12) appellants could invoke any objection to the proceedings, insofar as they affect appellants, which might at the beginning have been invoked by the parties respondent to the process which initiated the proceedings. But it will be noted that in the statute above referred to the

owners of lands assessed for benefits, but no part of which was taken, are permitted merely to "file with the Court any objections or exceptions they may have to the verdict." It does not permit them "to retry issues of fact already determined by the jury." (*Shannon and Luchs Construction Company vs. Reichelderfer, supra.*)

The case of *Mitchell vs. Reichelderfer*, 61 App. D.C. 50, we submit, is decisive of the question here under discussion. In that case certain property owners whose lands were assessed for benefits, but no part of whose land was taken, were given notice of such assessments under the Act of May 29, 1928. They then filed objections and exceptions to the verdict, contending that, under said Act, they were entitled to have the jury recalled and to be given an opportunity to present before the jury such evidence as they might desire to offer. In denying this contention the Court said:

Public notice also was regularly given of the proceeding by advertisement in three daily newspapers published in the District, warning and requiring "all persons having any interest in the proceeding" to appear in court at a day named in the notice, and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits by the jury as provided by the act.

* * * * *

Two propositions are urged by appellants in support of their appeal: First, a claim that appellants were entitled to have their objections on the question of benefits heard by the condemnation jury; and, second, that the amounts assessed as benefits were excessive and not commensurate with the actual benefits to their properties.

The first of these claims is not sustained by the law. **The mere filing of objections and exceptions to the verdict of a condemnation jury does not entitle a property owner to reopen and retry the case to the same or another jury.** The procedure in relation to such complaints is governed by section 491h of the D.C. Code (D.C. Code 1929, T. 25, sec. 59), which provides as follows: "The said court shall hear and determine any objections or exceptions that may be filed to any verdict of the jury and shall have power to vacate and set any verdict aside, in whole or in part, when satisfied that it is unjust or unreasonable, in which event the court shall order the jury commission to draw from the special box the names of as many persons as the court may direct, and from among the persons so drawn the court shall thereupon appoint a new jury of five capable and disinterested persons, who shall proceed to ascertain the damages or assess the benefits, or both, as the case may be, in respect of the land as to which the verdict may be vacated, as in the case of the first jury. * * *"

The procedure thus provided designs to give personal notice of the proceeding to those whose lands may be taken for the improvement, and to give notice by publication to all other persons having any interest in the proceeding, and, in event of dissatisfaction by any such person with the verdict, to permit of the filing of objections and exceptions against the assessment of damages or benefits. Such objections and exceptions, however, are in the nature of a motion for a new trial, and are not to be tried by the condemnation jury, but are to be heard by the court, upon affidavits if such are filed, and only in case they are sustained by the court shall another jury be impaneled to retry the issue. *Clapp vs. Macfarland*, 20 App. D.C. 224, 230 * * *

* * * * *

In the instant case each of the appellants had lawful notice of the proceeding prior to any action taken by the court therein. Van Kirk and Collins were served personally with timely notice. The public notice required by section 491c, *supra*, was duly given. Mitchell, Touey, and Demas were served with notice after the return of the verdict of the assessments for benefits upon their lands, as required by Act of Congress approved May 29, 1928, *supra*. Acting upon such notice, the appellants filed their objections and exceptions, which were duly considered and decided by the court. All had their day in court. *Wight v. Davidson*, *supra*.

In the case of *Shannon and Luchs Construction Company vs. Reichelderfer, supra*, this Court, in referring to the two-fold character of these proceedings (one for condemnation under the power of eminent domain and the other the assessment of benefits under the power of taxation), this Court said:

Congress manifestly intended that the condemnation proceedings should be concluded before the second stage of the proceedings should be instituted.

But here appellants have awaited the conclusion of the condemnation stage of these proceedings and, after the verdict has been confirmed as to the damages awarded the property owners whose lands were taken, now come into court and seek to question the right of the Commissioners to institute these proceedings. In other words, they have waited until the benefit has been received and now seek to escape the payment of their just proportion of the cost thereof.

Exceptions and objections to the verdict of the condemnation jury being, as held in the case of *Mitchell vs. Reichelderfer, supra*, in the nature of a motion for a new trial, they could be addressed only to exceptions taken at the trial or to the verdict. No exceptions were taken by appellants at the trial, and hence they are limited here to raising questions relating to the verdict. They cannot reopen and retry the question of the conformity of these proceedings with the highway plan.

The case of *Smith vs. Gotwals*, 61 App.D.C. 304, relied upon by counsel for appellants is not in point. In that case the District had failed to give a property owner, no part of whose land was taken but whose land was assessed for benefits, the notice required by the Act of May 29, 1928, and it was merely held that the property owner was not required to file exceptions and objections to the verdict until the notice required by law was given him.

POINT V

THE CONDEMNATION OF PART OF LOT 13 WAS PROPER

Counsel for appellants contend that the condemnation of part of lot 13 was unwarranted, unnecessary and discriminatory for the reason that the part of it condemned was the identical part already restricted against building.

But the taking of a portion of lot 13, even though it was subject to a building restriction line, was not unnecessary. From a reference to the plat opposite page 6 of the Record it will be noted that the north line of lot 13 runs at an angle to the street of about 45 degrees. Hence, if the land in lot 801 was condemned without the land in lot 13, the result would be that a triangular piece of land under private ownership would inject itself into the public street with publicly owned land between it and the now existing lot line of lot 801. This would present an intolerable condition. It would leave publicly owned land in the street separated

from the remainder of the width of the street by privately owned land.

Whether this condemnation of part of lot 13 was necessary was a matter lying within the discretion of the Commissioners of the District. It appears from the Record (page 54) that the Commissioners, on March 8, 1932, entered an order directing the institution of these condemnation proceedings.

In the case of *Macfarland vs. Elverson*, 32 App. D.C. 81, the Court said:

When the power to condemn and take property for a public use has been by general statute conferred upon municipal officers by the proper legislative authority, it rests with such officers to determine whether it shall be exercised, and when and to what extent it shall be exercised. This discretion lies entirely with the local authorities. It is for them to determine when a public improvement is necessary, and, so long as they do not exceed or abuse the power delegated to them, the courts are powerless to inquire into the motives which actuate them or the propriety of the contemplated improvement.

And in *District of Columbia vs. Washington Steel and Ordnance Company*, 43 App.D.C. 344, this court said:

The act declares in plain and unambiguous language that the land is to be condemned "for a public highway and for park purposes". This being a public use, the court will not inquire into either the necessity or

expediency of the exercise of the right of eminent domain, since these questions are purely for the legislative branch of the government.

Furthermore under the authorities cited under Point IV this objection comes too late.

It must be remembered that the damages and benefits in this case do not equal, and that a considerable part of the cost of these proceedings must be borne by the District of Columbia. The jury has awarded as damages \$720.00 for the part of lot 13 which was taken; \$10,780.00 for the part of the lot 801 which was taken; and the costs and expenses amounted to \$595.24, making a total of \$12,095.24. The amounts assessed as benefits total but \$6,882.50. Therefore, after deducting from the costs of the proceedings the amount awarded the owner of lot 13, the assessable cost would still exceed by a large amount the benefits found to exist. Since it appears in the Record (plat opposite page 6) that the portion of lot 13 which was condemned was subject to a building restriction line, it is fair to assume that the jury took that fact into consideration in assessing benefits against appellants' properties.

POINT VI

IN THE MATTER OF THE CREDIT FOR THE DEDICATION
OF VAN NESS STREET THERE IS NO ERROR

The property owners assessed for benefits east of Wisconsin Avenue were entitled to receive the benefit of the provisions of section 491g of the

Code. (D.C. Code of 1929, Title 25, section 58) because each property assessed was within the boundary of the subdivision, which, when recorded, dedicated Van Ness Street to the District of Columbia. The dedication of this street, as well as the other streets and alleys shown on the plat (Exhibit "B" opposite page 66 of the Record) was a necessary incident of the recording of this subdivision of land. The owners desired to convert their acreage into city building lots, but as they were not compelled to do so, it is only reasonable to presume that they found it a profitable thing to do, notwithstanding the law required this dedication. If, then, it were a profitable thing to do, it follows that the value of all the area not dedicated was benefited at least to the amount of the value of the land dedicated.

Appellants stress the point that they are the successors in title of the owners of the original parcels which were then in one ownership and constituted a single "tract". However, reference to the plat (Exhibit "B" opposite page 66 of the Record) indicates that this subdivision was carved, not from a single "tract" but from "tracts" of land taxed as parcels 34/31, 34/33, 34/35 and 34/37, and also blocks 1 and 2 of Armsleigh Park. In their brief (page 21) appellants say,—

The only correct method, * * * for application where there is a split in ownership between the time of dedication and that

of condemnation, is first to apply the total tract's credit against the benefit to the tract, then apportion the net benefit, if any there is, among the lots.

Appellants also say in their brief (page 20)—

If the tract had remained in single ownership, our proposition that the verdict is contrary to the statute would be a demonstration, * * *.

These contentions are based upon a misapprehension of the facts. In their effort to show that the approved procedure in the court below is error, appellants overlook numerous fundamental principles. In a proceeding to condemn land for the opening of a major street, the jury proceeds, first, to ascertain the value of the land taken, and resulting damage to the remainders, if any. The question of damages, under the court's instruction, is to be definitely decided first, before consideration is given to the question of benefits. With this done, then without any consideration as to the sum total of the damages, it is the jury's duty to assess benefits against each and every piece of property within the District of Columbia found to be benefited by reason of the opening and widening of the street. Under the court's instruction, (Rec. p. 62) the jury is told that "by the opening, widening, and extension of said streets the jury are to understand the establishment, laying out and completion for all the ordinary purposes of a public thoroughfare."

When this second step is completed, the jury must next find whether or not the sum total of the benefits exceeds the sum total of the award of damages, and, if so, it becomes their duty to scale down the benefits so they equal the damages plus the costs and expenses of the proceedings. In the event, however, that the benefits are below the damages they are required to take no action in this third step.

The court's fourth instruction to the jury (page 62 of the Record) is as follows:

After ascertaining the full amount of benefits which all of the parcels of land in the District of Columbia will receive from the proposed condemnation, you shall, where part of any parcel or tract of land has been already dedicated for the purposes of the street or road involved in this proceeding, take into consideration the fact of such dedication and the present value of the land dedicated, in determining whether the remainder of said parcel or tract is to be assessed for benefits, and the amount of benefits, if any, to be assessed thereon.

This instruction is based on that portion of section 491g of the Code which provides as follows:

And where part of any lot, piece, parcel, or tract of land has been dedicated for the opening, extension, widening, or straightening of the street, avenue, road, or highway, the jury, in determining whether the re-

mainder of said lot, piece, parcel, or tract is to be assessed for benefits, and the amount of benefits, if any, to be assessed thereon, shall also take into consideration the fact of such dedication and the value of the land so dedicated, * * *

and on Mr. Justice Robb's opinion in *Briggs vs. Brownlow*, 49 App.D.C. 345, wherein he stated that the test of value is the present value of the land so dedicated. The record shows, and there is no conflict on this point, that the District introduced testimony as to the area of the land dedicated for Van Ness Street, and gave testimony tending to prove its present fair market value.

We have shown that the jury must first assess all properties found to be benefited before they consider the giving of credit for dedication. The map or plat of subdivision (Exhibit "B" opposite page 66 of the Record) shows that several tracts were involved in the dedication for Van Ness Street. All of parcel 34/33 was dedicated, and parts of parcels 34/35, 34/31 and 34/37 were dedicated. It would appear from appellants' argument that if the value of a street dedicated exceeded the value of land to be condemned, as soon as that fact were ascertained, the jury should stop as there could be no assessments of benefits. The properties west of Wisconsin Avenue that were assessed were assessed on testimony that they would be enhanced in value, and they received no credit because they were not

involved in the dedication. Would not appellants' argument prevent assessment against these properties as well as those in the subdivision? We respectfully submit that every single lot in a subdivided tract or tracts contributes its pro rata share of every square foot of land dedicated for street and alley purposes and that when credit is given that credit should be distributed among all lots. In other words, each lot should be given the separate credit to which it is entitled. Such was the case in every instance where a lot was benefited in this subdivision. There was testimony that that lot should receive credit for its share in the value of the land dedicated for Van Ness Street. Had every lot in the entire subdivision been benefited, under this evidence, every lot would have received a credit. The fact that every lot was not assessed a benefit does not justify the giving of the sum total of this credit to those who were assessed.

POINT VII

THE TESTIMONY AS TO THE VALUE OF THE LAND
DEDICATED FOR VAN NESS STREET WAS FAIR AND
REASONABLE

We have no way of ascertaining the amount that the jury allowed for credit purposes but their finding of facts was based upon testimony of a duly qualified real-estate expert and one who had personally conducted the acquisition of the tracts which made up the subdivision shown in Exhibit

“B” (Record opposite page 66), and who had personally supervised the making of this subdivision and the dedication of the lands shown thereon (Record page 56). Certainly this witness, who had assembled the tracts and supervised the creation of the subdivision, should have expert knowledge of his own creation. He gave testimony tending to prove that the 74,930 square feet of land dedicated for Van Ness Street was worth today 15 cents per square foot, or a total of \$11,239.50 (Record p. 57).

Appellants attempt to demonstrate that this allowance is unreasonable by comparison with the award of the jury for the 512.93 square feet condemned from lot 13.

Appellants would have the court believe that the jury found that the 512.93 square feet condemned from lot 13 were worth \$1.40 per square foot, or \$720.00. This is just another indication that appellants were not careful to ascertain just what procedure is followed in these condemnation cases. Reference to the testimony of the District's witnesses (Record pages 57 and 59) will clearly and definitely show that the \$720.00 awarded by the jury, included not only damages for the land taken but resulting damage to the area left, both witnesses being of the opinion that the total value of this lot was destroyed. The record fails to show that appellants filed affidavits in support of their contention that the dedicated area was of a value in excess of that testified to by the District witness.

Their method of comparison of values is unique and indicative of the fact that they failed to give serious consideration to this matter. The property condemned was mostly commercial property, some facing Wisconsin Avenue, some in proximity with Wisconsin Avenue, the remainder being on a public alley and facing an improved public highway. There can be no comparison between the value of this land and of that which lies in the bed of a street. It must be remembered there is a vast difference between the value of a piece of land lying in an unsubdivided tract and that same piece of land after the District has opened a street abutting such land. When a property owner subdivides a tract of land and makes a dedication for a street and the District opens such street for travel, the lots abutting such street acquire a value far in excess of their value as acreage property. Can it be said that the land dedicated for the street possesses the same value as the lots abutting thereon after the opening of the street? We submit it could not. Take away the street, and the lots revert to their acreage value.

There can be but one way to place the value of streets heretofore dedicated for highway purposes, and improved by the District of Columbia, and that is by considering that the street reverts to private ownership, which of necessity must mean that the subdivision becomes non-existent and the street acreage as if it had never been dedicated. That is

exactly the way this land was valued. If it is to be valued just as it actually exists, as a street, then it would need no argument to show that the only portions valuable would be those which faced other streets. The interior portion would be entirely surrounded by private property and would be land which could not be subdivided, and for all practical purposes worthless. In considering that the valuation should be placed on a street as acreage property in private ownership as if there were no subdivision, the District courts have been more than generous to property owners in the matter of these dedications.

POINT VIII

THERE IS NO SHOWING IN THIS RECORD THAT THE ASSESSMENTS FOR BENEFITS LEVIED AGAINST APPELLANT'S PROPERTY WERE NOT JUST AND REASONABLE.

The Washington City Orphan Asylum is the owner of parcel 34/92 and lot 800 in Square 1724, and these two properties were assessed benefits totaling \$500.00. This tract contains some fourteen acres and was assessed less than one-eighth cent per square foot. The maximum amount of benefit testified to by the District witnesses for this property was \$753.18. This assessment was well within the range of testimony. The jury could not exempt this property from assessment because it was the property of the Washington City Orphan Asylum, as under existing law all property benefited must be assessed. In *Garfield Memorial Hospital vs.*

Macfarland, 31 App.D.C., 447, this Court, through Mr. Justice Van Orsdel, confirmed the following opinion:

* * | * The statute directs the jury to assess the benefits on the pieces or parcels of land benefited by such extension, and the amount of the assessment for such benefits against the same; and the court has power to hear and determine objections filed to the verdict and award, and to set aside or vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable; but there seems to be no jurisdiction given the District Court thereby to say what lands, if any, are exempt; and no discretion appears to be given to the jury to leave out of their consideration any lands because the title to the same may be in the hospital, or even in the municipal government, or in any church society, or other institution, which might be exempt from taxation. If the hospital is exempt, or if the District Commissioners, under the tenure by which the hospital holds the said lands, are obliged to assume the assessment, then that question can be disposed of after confirmation of the verdict; and, therefore, without deciding whether the hospital is required to pay these assessments, or is exempt from them, I am constrained to overrule the exceptions and to confirm the award, notwithstanding the argument of counsel in behalf of the hospital.

Furthermore, we are not concerned here with whether this property is benefited for the uses to

which it is now being put. If its value is increased by this improvement it is subject to assessments for benefits in these proceedings. (*Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 434; *Valley Farms Co. v. Westchester*, 261 U.S. 155; *Kansas City Ry. vs. Road District*, 266 U.S. 377;)

Reference is made to an assessment of benefits by another jury in a District Court case, known as District Court Case No. 1947. We respectfully submit that consideration should not be given to a verdict of another jury based upon an entirely different set of facts, nor should the fact that a benefit was assessed against this same property in another and earlier case, have any bearing on the reasonableness or unreasonableness of a benefit assessment in this case. We believe that the case of *Bauman vs. Ross*, 167 U.S. 550, 595, definitely settled this point. The language of the court is as follows:

The objection that the owners of lands assessed for benefits under these proceedings will be left liable to be assessed anew under future proceedings for establishing other highways in other subdivisions is without force. Whenever it has been provided by a general law that a part of the expense of establishing any highway shall be assessed upon all lands in the neighborhood benefited thereby, it may often happen that the same land may be benefited by each of two high-

ways laid out at successive periods of time, and be liable to be assessed accordingly. Take a simple example by way of illustration: Suppose a highway is laid out from north to south, increasing the value of the lands through which it runs and of all other lands in the neighborhood, and assessments of a portion of the cost are made upon all such lands and collected: and another highway is subsequently laid out from east to west, crossing the first highway at right angles: it may well happen that thereby the same, or some of the same, parcels of land benefited by the first highway, may be further increased in value, in common with other lands in the neighborhood, by the laying out of the second highway: and, to the extent to which they are so increased in value, they may justly and lawfully be subjected to a new assessment. The like result may take place when a highway, established at first through one subdivision only, is afterwards extended through another subdivision.

Appellants contend (Brief, page 24) that the assessment of benefits by the jury is unreasonable and illogical, because one side of Veazey Street is assessed for benefits "when both sides are equally benefited". Reference to page 13 of the Record shows that the jury assessed both sides of Veazey Street, between 38th and 39th Streets. If additional area, which appellants think was benefited, was not assessed, we submit that the District alone

suffers the loss, and we are unable to see how the failure of the jury to assess the remaining lots north of Veazey Street in any way has anything to do with the question of the enhancement in value of appellants' property west of Wisconsin Avenue.

In so far as their assessments are concerned, they fail to show that the amounts assessed are not in conformity with the testimony and in conformity with the instructions of the court as to benefits. The Supreme Court of the United States, and this Court, have, on numerous occasions, stated that the judgment of the court will not be substituted for the findings of a jury. In *Columbia Heights Realty Company vs. Rudolph*, 217 U.S. 547, 560, the Supreme Court of the United States said:

The power of the court to review the award by such a jury must in the very nature of the matter be limited to plain errors of law, misconduct or grave error of fact, indicating plain partiality or corruption * * * and did not involve mere error in judgment * * *. The jury was expected to exercise its own judgment, derived from personal knowledge from a view of the premises, as well as from the opinion evidence which might be brought before them.

Seufferle vs. Macfarland, 28 App.D.C. 94.

Weigand vs. Siddons, 41 App.D.C. 130.

Phillips vs. U.S., 40 App.D.C. 261.

Concord Improvement Co. v. Reichelderfer, 61 W.L.R. 356.

POINT IX

THE UNCONDEMNED PORTIONS OF LOT 801 AND LOT 13
WERE NOT BENEFITED

The record fails to show that there was any testimony that the uncondemned portions of these properties would be benefited, and the verdict of the jury indicates that the jury was of the opinion that there would be no benefit to the remainders after condemnation. Even if the jury and witnesses were in error as to this, we are unable to see how that error would be favorable to appellants, the benefits and damages in this case not being equal. However, we respectfully submit that it is apparent that there are no resulting benefits to these two properties. The record shows that both real estate experts and the jury were of the opinion that lot 13 was damaged to its full value, and therefore, insofar as this lot is concerned, there could be no benefit to the remainder. Lot 801 was a valuable corner commercial property, according to the testimony, with a frontage of 37.26 feet on Wisconsin Avenue (Record, page 57.) It will be observed that the commercial frontage on Wisconsin Avenue was cut practically in half, and that the principal portion of the remainder of this irregularly shaped lot was in the rear. The question of benefits is dependent upon a number of factors, such as change in topographical conditions, the effect of zoning, and the result of the extension or widening of a street, and the witnesses who testi-

fied, and the jury that returned its verdict, were fully cognizant of these facts, as is shown by the record in its entirety.

CONCLUSION

It is respectfully submitted that the action of the lower court in overruling objections and exceptions filed by appellants, and in ratifying and confirming the verdict of the condemnation jury, was right and should be affirmed.

WILLIAM W. BRIDE,
Corporation Counsel, D.C.,

VERNON E. WEST,
*Principal Assistant
Corporation Counsel, D.C.,*

WALTER L. FOWLER,
*Assistant Corporation Counsel, D.C.,
Attorneys for Appellees.*

MAR 20 1934

Henry W. Hodges
In the Court of Appeals
OF THE DISTRICT OF COLUMBIA

CLERK

—
No. 5962
—

WILLIAM J. NEALEY, ET AL., APPELLANTS,

vs.

MELVIN C. HAZEN, ET AL., COMMISSIONERS
OF THE DISTRICT OF COLUMBIA.

—
Motion For Rehearing and Brief in Support.
—

The appellants, William J. Nealey and others, by their counsel, respectfully move for a rehearing upon the following grounds:

This appeal has been decided upon the belief entertained by the Court that the Commissioners proceeded herein under the Act of Congress of May (March) 4, 1913 (37 Stats. 950), which required that the amount found to be due and awarded by the jury as damages for the land condemned, plus the costs and expenses, shall be assessed by the jury as benefits.

The fact conceded by both sides is that the Commissioners conducted this proceeding under the Act of Congress approved May 28, 1926 (44 Stats. 675, D. C. Code of 1929, Title 25, Section 69), which provides (R., top p. 3) that the damages and costs may be assessed as benefits, but contemplates and permits assessment of benefits in lesser amount than the damages and costs, and further provides, Section 2 (R. p. 3), that the excess

of damages over benefits shall be paid out of appropriations therein authorized. The Court below was under no misapprehension as to this (see Instruction 14, R. 64).

The Commissioners' petition which initiated this proceeding reads (R. 2):

"And that they conduct this proceeding as authorized by a certain Act of Congress, approved May 28, 1926, entitled 'An Act to provide for the condemnation of land for the . . . widening . . . of streets . . . in accordance with the plan of the permanent system of highways for the District of Columbia, and for other purposes,' which Act reads as follows:"

The repeated references throughout the opinion to the effect that the requirements of the Statute of 1913 were not followed by the Commissioners or by the jury, and the conclusion of the Court therefrom that the appellants had obtained an advantage not contemplated by the statute, demonstrate that this mistake, as to which statute the Commissioners were invoking, controlled the decision of the Court.

Furthermore, the appellants' principal point endeavored to be made in their brief (pp. 6 to 10), viz., that the Commissioners had no statutory authority to prosecute this proceeding, which contention may be otherwise stated as a contention that the Commissioners' proceeding is unauthorized because they have not followed their statutory authority, was consequently misunderstood. The opinion refers to this contention as follows:

"Appellants cannot be heard to complain that the provision of the statute requiring all the damages and costs to be assessed as benefits was not followed in this case, since the assessments for benefits would have been very greatly increased had the provision of the statute been followed."

What the appellants actually contend is not what is supposed in the quoted sentence. It is that both statutes authorize assessments of benefits for condemnations only if they be—

“in accordance with the plan of the permanent system of highways for the District of Columbia.”

We say (brief, p. 7) “If the addition of the 15 foot strip sought to be condemned in this proceeding to the north side of Van Ness Street will not make that street conform to the Highway Plan then the Commissioners have no authority to prosecute the proceeding.” We relied in this regard on *Dougherty vs. Galliher*, 58 App. D. C. 166, 167, which, like this, was a proceeding under the Act of May 28, 1926 (compare pp. 2-3, Record in that case, No. 4658, October, 1927, term, with Record in present case, pp. 2-3).

In discussing objections made by persons summoned in as were appellants, the opinion refers to prior cases in which such objections were appropriately said to be in the nature of a motion for a new trial. In the present case, this principal point made by appellants is more analogous to a motion in arrest of judgment.

We do not contend as did the moving party in *Mitchell vs. Reichelderfer*, 61 App. D. C. 50, that the mere filing of our objections in itself entitled us to a re-trial before a jury. Only if our objections considered in the light of the proven and admitted facts (and there was no dispute of facts here) showed as a matter of law that what the Commissioners were attempting to do was unauthorized and illegal because not in accordance with the Highway Plan, would we be entitled to prevail, and the judgment of the Court sought by us on this our principal contention was not an order for a re-trial of the question of benefits,

but a dismissal of the proceeding as to these appellants upon the ground that the Commissioners were not authorized to bring it.

The District's principal reply to our contention was that we were making too late an objection vital to the maintenance of the proceeding.

We relied on *Smith vs. Gottwals*, 61 App. D. C. 304, where it was held as to an assessee of benefits.

"Until he was brought in there was no obligation imposed on him to take any action in relation thereto, since whatever action was taken insofar as his rights are concerned was necessarily void."

The opinion in the present case appears to agree with us on this issue for it says—

"The appellants are not to be criticized for failing to appear at the condemnation proceedings, for they had no notice that any of their rights would be affected by that proceeding."

As we view the case, to secure the dismissal of a proceeding about to ripen into a judgment for money against the appellants, which proceeding was beyond the statutory authority of the Commissioners (because it was brought to condemn and assess benefits for the taking of land not in conformity with the Highway Plan), it was necessary only to point out that the street as so widened would not be in accordance with the Highway Plan.

If we had made plain what the statute was, and what our point was, we confidently expected this Court to hold that if the owner of land could require that the Commissioners show statutory authority to take his land (as was held in the *Gallier* case), owners of land in the vicinity could require the Commissioners to show statutory authority to assess benefits for the taking.

Nevertheless, and solely to make it plain that the position we took was not unreasonable nor unduly technical, we pointed out that it was open to the Commissioners to have proceeded under the Act of June 21, 1906 (34 Stats. 384), to accomplish the purpose they had in mind, by extending the building restriction line (brief, pp. 9 to 10). This Court in its opinion (top of p. 3) finds this subsidiary contention of ours to be sound; but the Court in the next paragraph points out again that if the requirements of the statute (of 1913, under the limitations of which the Court, mistakenly assumed the proceeding was brought) had been followed, a larger assessment would have been made against the appellants. On this false assumption the Court naturally concludes that any error was harmless. We venture to repeat that our point was not that the requirements of the Act of 1913 were not followed, but that the jurisdictional basis for an assessment of benefits under the Act of 1926 did not exist because the proceeding was not one to take land "in accordance with the plan of the permanent system of highways." Any proceeding not authorized by statute which has resulted in a money judgment against the appellants has fulfilled the test laid down in the opinion for reversible error, that is, it has (Opinion, top p. 4) "operated to their prejudice."

Such contentions as we made on this appeal having to do with the amount of benefits assessed and the failure to give, as we contended, credit for the original dedication, were of less importance; because if this Court had agreed with us on these contentions, the result would have been the ordering of a re-trial on the assessment of benefits; whereas if our principal and statutory contention of law had been sustained, the proceed-

ing would have been ordered dismissed. On this matter of credit for prior dedications, covered in our original brief (pp. 17 to 22), we will not burden this Court with a repetition of what is there said, but we feel compelled to point out that the present opinion on this point reverses without noticing *Briggs vs. Brownlow*, 49 App. D. C. 345, 347, cited in our brief (p. 20). The present opinion says:

“The proper basis of credit value is the value of the property dedicated at the time of the original dedication, when the donation to the District was made, in its original acreage condition.”

In *Briggs vs. Brownlow*, this Court without dissent, dealing with the identical problem, said (p. 347):

“We are of the view that the value of the land dedicated, as well as the value of the land condemned, should be considered as of the date of condemnation.”

Furthermore, the Court's mistake as to the statute under which the Commissioners proceeded naturally led the Court to consider that damages and benefits were interdependent, and to consider that it was material to the question of benefits that only \$720 had been paid for that portion of lot 13 unnecessarily condemned. But under the statute of 1926 the damages and benefits are separately assessed and their amounts are unrelated (Instruction 14, R. 64). When, therefore, it is established (and the Court agrees with us on this) that no part of lot 13 need have been condemned, the amount paid for it is immaterial to the question of benefits, and what is material is that an unrelated and unascertainable part of the benefit assessed was for the street space created where the restricted part of lot 13 had been.

We respectfully submit that though motions for rehearing in simple cases which have been fully heard and in which there is no dissent are rarely granted, this motion has a peculiar and appealing merit and should be granted not only in order that appellants' case may be reconsidered, but in order that the unmerited stigma of not having followed the statute may not be put upon the Commissioners and the Court below, by reason of a misapprehension on the part of this Court of the identity of the statute pursuant to which the Commissioners proceeded. This motion will be served on the Commissioners' counsel when it is filed, and we confidently predict that they will not dispute our assertion that the record shows that the Commissioners proceeded herein under the Act of May 28, 1926, which is, as first above stated, vitally different in those respects upon which the former statute is relied on in the opinion of the Court.

Respectfully submitted,

DION S. BIRNEY,
PAUL E. LESH,

Attorneys for Appellant Nealey and others.